Kirkpatrick Electric Co., Inc. *and* International Brotherhood of Electrical Workers, Local Union 136, AFL–CIO. Case 10–CA–26166

September 9, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

The issues addressed here are whether the judge correctly found that: (1) the Respondent is subject to the Board's jurisdiction; (2) the Respondent did not violate Section 8(a)(5) of the Act by repudiating its collective-bargaining agreement with the Union; and (3) the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Randall Mauldin.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Kirkpatrick Electric Co., Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Edward A. Smith, Esq., for the General Counsel.
Eugene W. Fuquay, Esq., of Birmingham, Alabama, for the Respondent.
Gary C. Reaves, Bus. Mgr. (IBEW 136), of Homewood, Alabama, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. Kirkpatrick Electric Co., Inc. (KEC) wants to walk away from IBEW Local 136 and a 1991–1994 collective-bargaining agreement (CBA). Ordinarily KEC would not be able to do so in the circumstances here. KEC succeeds here only because the certified bargaining unit has shrunk to a single statutory employee, Randall W. Mauldin.

Effective June 1, 1992, Kirkpatrick Electric Co., Inc. (KEC) withdrew recognition from IBEW Local 136 and abrogated the 1991–1994 collective-bargaining agreement (CBA), and on June 4, 1992, KEC terminated Randall W. Mauldin. Because KEC never canceled the assignment of its bargaining rights to NECA, made in June 1988 when KEC signed a Letter of Assent A, ordinarily I would find that its June 1, 1992 withdrawal of recognition and refusal to honor the 1991–1994 CBA violated Section 8(a)(5) of the Act. As I discuss at the conclusion of this decision, KEC apparently labors under the mistaken impression that its relationship with the Union was an escapable 8(f) situation, when in fact the Union enjoys (or would enjoy) the plenary power of a 9(a) representative.

I find that KEC violated Section 8(a)(3) of the Act on June 4, 1992, when it discharged Mauldin. I order KEC to reinstate Mauldin and to make him whole, with interest.

I presided at this 1-day trial on April 29, 1993, in Birmingham, Alabama, pursuant to the April 5, 1993 amended complaint (complaint) issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 10 of the Board. The complaint is based on a charge filed and served on August 7, 1992, by International Brotherhood of Electrical Workers, Local Union 136 (the Union or Local 136) against Kirkpatrick Electric Co., Inc. (Respondent, Kirkpatrick, KEC, or Company).

In the Government's complaint the General Counsel alleges that Respondent Kirkpatrick violated Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), about May 28, 1992, when it withdrew recognition from the Union and violated Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), on June 4, 1992, when it fired Randall Mauldin.

By its answer KEC admits some facts, denies violating the Act, and raises certain affirmative defenses, including that of limitations under 29 U.S.C. § 160(b).

[1] On July 14, 1993, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel and the Respondent each filed exceptions and a supporting brief.

[2] In finding that Larry Earnest is not an employee within the meaning of Sec. 2(3), we rely only on the fact that his mother is a 50-percent shareholder in the Respondent.

[3] We agree with the judge that Respondent proved that it had no enforceable obligation to recognize or bargain with the Union as of June 1, 1991, because it had a permanent bargaining unit complement of only one statutory employee. We disavow the judge's observation that the Respondent's bargaining duty would resume should the unit expand to two or more statutory employees at any time during the term of the Respondent's 1991–1994 contract with the Union. The bargaining relationship, once lawfully terminated, does not persist inchoate. It can only be reestablished through procedures recognized under Sec. 9(a) or 8(f).

[4] The General Counsel contends in exceptions that the judge erroneously stated that the Respondent could litigate in compliance proceedings whether it permanently eliminated the electrician's apprentice position on June 4, 1992, when it unlawfully discharged discriminatee Randall Mauldin. We agree with the General Counsel. The question of whether the Respondent would have discharged Mauldin on June 4 for legitimate reasons has already been litigated, in accord with the standard set forth in *Wright Line*, 251 NLRB 1083 (1980). The Respondent cannot relitigate that issue in compliance, but it may seek to prove that events subsequent to and unrelated to the discharge affect the reinstatement and backpay remedy for Mauldin.

Unless I indicate otherwise, all dates are for 1992. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and by the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

An Alabama corporation with an office and place of business at Birmingham, Alabama, Kirkpatrick performs electrical construction and maintenance. Although admitting in its answer that at all material times it has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, KEC also denied the commerce allegations. At trial the parties stipulated (Tr. 1:7) as follows (GCX 2):[1]

> Kirkpatrick Electric Co., Inc., during the past calendar year has provided services valued, in aggregate, at greater than $50,000 to various enterprises within the State of Alabama that are, themselves, directly engaged in interstate commerce and meet the Board's direct jurisdictional standards, and that as a result of the commercial activity described above, Kirkpatrick Electric Co., Inc. is subject to the jurisdiction of the National Labor Relations Board as such jurisdiction is alleged in paragraph 4 of the National Labor Relations Board's Amended Complaint in the above-captioned matter.

Complaint paragraph 4, denied in KEC's answer, alleges:

> Respondent, during the past calendar year, which period is representative of all times material herein, provided services valued, in the aggregate, at greater than $50,000 to the following enterprises within the State of Alabama: Coca Cola Bottling Company, Secor Federal Savings Bank and Tulip Corporation. Coca Cola Bottling Company and Tulip Corporation are Alabama enterprises that are directly engaged in interstate commerce and meet the Board's jurisdictional standards for direct inflow. Secor Federal Savings Bank is an Alabama enterprise that, in turn, annually derives in excess of $50,000 in functioning as an essential link in the transportation of commodities in interstate commerce.

Although the stipulation, with its reference to complaint paragraph 4, is not a model of clarity and specificity, I find that by its language the parties agreed: (1) During the past calendar year (that is, during 1992), (2) KEC provided services totaling, in aggregate, more than $50,000 (3) to firms operating inside Alabama, including Coca Cola Bottling Company and Tulip Corporation, (4) which themselves are directly engaged in commerce and (5) which (from complaint par. 4) ''meet the Board's jurisdictional standards for direct inflow.'' The ''themselves'' in item (5) is a plural word, but it is clear from the context that the reference is to ''each of'' the firms as meeting the Board's standard for direct inflow.

The Board's discretionary standard for direct inflow is that KEC provide at least $50,000 in goods or services to firms each of which in turn received goods or services valued at $50,000 or more directly from points outside Alabama. *Siemons Mailing Service*, 122 NLRB 81 (1959). (Contrary to pleadings in some cases, and language even in some court decisions, the Board's $50,000 threshold standard is just that. It is not a standard requiring an amount exceeding $50,000. *Siemons*, supra at 85.) The stipulation, including complaint paragraph 4, shows that KEC meets the *Siemons* indirect outflow standard because (1) KEC provided $50,000 or more in services (2) to users (Coca Cola; Tulip) each of which in turn meets *Siemons*' direct inflow standard. That is, they received direct from outside Alabama goods or services valued at $50,000 or more. Finally, because Secor Federal Savings Bank (complaint par. 4) derives at least $50,000 functioning as an essential link in the transportation of commodities in interstate commerce, that connection alone satisfies the indirect outflow standard which the Board set in *Siemons.*

At trial KEC's attorney expressed his understanding that the stipulation does not, and was not intended to, indicate that the individual enterprises [such as Coca Cola and Tulip] each grossed $50,000. (Tr. 1:10.) KEC's counsel did not thereafter move to modify the stipulation. Accordingly, the stipulation binds the parties. *Academy of Art College*, 241 NLRB 454, 455 (1979), enfd. 620 F.2d 720 (9th Cir. 1980).

On the key point KEC argues that there is no reference in the stipulation to the required $50,000 respecting the users. But there is. It is incorporated in the term ''direct inflow.'' That term is a $50,000 standard defined in *Siemons*. Finding, therefore, that KEC meets the Board's indirect outflow standard for discretionary jurisdiction, I further find, as admitted, that Kirkpatrick is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

In any event, jurisdiction is established respecting KEC because KEC signed the Assent A, thereby joining forces with a group in an activity that has an indisputable impact on commerce so far as the Act is concerned. *Stack Electric*, 290 NLRB 575, 576–577 (1988).

II. LABOR ORGANIZATION INVOLVED

The pleadings establish that IBEW Local 136 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. Witnesses

Six witnesses testified before me. The General Counsel called four of the six: Meridith W. Tatum Sr., since January 1, 1993, a consultant with NECA, the National Electrical Contractors Association (Tr. 1:23); Randall W. Mauldin, the alleged discriminatee; J. Randy Bottomlee, the training director for the joint apprenticeship program (Tr. 1:91–92); and Gary C. Reaves, the Union's business manager (Tr. 1:101). After the General Counsel rested (Tr. 1:116), KEC called the other two witnesses: Larry Earnest, a journeyman electrician and close relative of those who own 67 percent of KEC's stock (Tr. 1:118–120); and Roy F. Ellas, KEC's president and owner of the remaining 33 percent of the stock (Tr. 1:119, 130). No rebuttal witnesses testified. (Tr. 1:154.)

[1] References to the one-volume transcript are by volume and page. Exhibits are designated GCX for the General Counsel's and RX for Respondent KEC's.

2. KEC's personnel

Roy F. Ellas has been president of KEC since 1975. (Tr. 1:69, 130.) Currently, in addition to Ellas, KEC employs two other persons: Ed Royal, the office manager and bookkeeper (Tr. 1:128, 132) who works 5 hours a day (Tr. 1:132), and Larry Earnest, an electrician (Tr. 1:120, 132). Before his June 4, 1992 termination, Randall W. Mauldin worked some 2 years for KEC as an apprentice electrician under Larry Earnest. (Tr. 1:67–68, 81, 83, 120.) Although Ellas testified that Arnold F. Earnest retired about June 1992 (Tr. 1:131–132), Ellas states that the work force as of Mauldin's termination consisted of Mauldin, Larry Earnest, Ed Royal, and Ellas. (Tr. 1:132.) The bargaining unit apparently consisted of Larry Earnest and Mauldin.

Larry Earnest's mother, Betty Earnest, owns 50 percent of KEC's stock, his wife owns 17 percent, and Ellas owns the other 33 percent. That has been the stock division since 1975. (Tr. 1:119–120.) Thus, Larry Earnest is closely related to persons who own 67 percent of KEC's stock. Ellas testified that the work KEC does now is one-man jobs of 2 to 4 hours a day, and that it has ceased bidding on jobs because it cannot match the less-than-CBA rates charged by KEC's 400 or so competitors in Birmingham who are Local 136 men operating open shop out of their trucks or from the back of their cars. KEC (even without the CBA) cannot compete with such one-man firms, Ellas testified, because KEC has to pay insurance and workers' compensation and such matters. ''There's no way'' KEC can compete with that, Ellas testified. (Tr. 1:147–148.)

3. The bargaining unit

On April 27, 1987, in Case 10–RC–13486, Region 10 conducted an election at KEC in which, out of three eligible voters, IBEW Local 136 won three to zero. (GCX 8; 1:90, 131.) The employees who voted were Arnold F. Earnest (husband of the majority stockholder), Larry C. Earnest, and Jerry (last name not stated), a journeyman electrician. (Tr. 1:120, 131.) The pleadings establish that on August 12, 1987, the Regional Director for Region 10 certified the Union as the exclusive collective-bargaining representative of all employees in the following bargaining unit:

> All construction and maintenance employees employed by the Employer at its Birmingham, Alabama, facility, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Although complaint paragraph 10 alleges that the Union has been the exclusive bargaining representative at all times since August 12, 1987, the certification date, the correct date is April 27, 1987, the election date. The certification date is when the Employer's limited duty to bargain following the Union's election victory ripens into the Employer's plenary statutory obligation, but the duty to bargain relates back to the election date. *Livingston Pipe & Tube v. NLRB*, 987 F.2d 422, 428 (7th Cir. 1993); *Lovejoy Industries*, 309 NLRB 1085, 1109 (1992); *Dow Chemical Co. v. NLRB*, 660 F.2d 637, 644 (5th Cir. 1981).

4. Letter of Assent A and the 1988–1991 CBA

For 22 years, and during the relevant time, Meridith W. Tatum Sr. was the chapter manager (Central Mississippi Chapter) for NECA, the National Electrical Contractors Association. (Tr. 1:23.) NECA, Tatum testified (and complaint par. 11, admitted, establishes) is a trade association composed of electrical contractors organized to promote the general industry of electrical contracting, to collect data for government and public, to promote safety, and to represent its employer-members in negotiating and administering collective-bargaining agreements (CBAs) with Local 136 and other locals of the IBEW. (Tr. 1:23–24).

In evidence is a copy (GCX 4) of the April 15, 1988, through May 31, 1991 collective-bargaining agreement, the ''Inside Agreement,'' (CBA1) between IBEW Local 136 and NECA's Central Mississippi Chapter, Birmingham Division. Also in evidence is a copy (RX 4) of the market recovery agreement (MRA) which reflects the same effective term of April 15, 1988, through May 31, 1991, for the same NECA chapter's Birmingham Division (NECA, herein). On its face the MRA, apparently more beneficial to contractors than certain provisions in CBA1, states that it is devised in recognition of ''depressed economic conditions.'' Tatum testifies that the MRA's purpose was to recapture the commercial market. (Tr. 1:56.)

The second paragraph of CBA1 provides that the agreement shall apply to all firms which sign a Letter of Assent to be bound by CBA1.

By letter (RX 2) dated May 18, 1988, the Union's international vice president, Dan Waters, forwarded copies of the new 1988–1991 contract, CBA1, and the MRA to KEC. Waters also enclosed a copy of Letter of Assent A for KEC's signature. KEC was interested in the MRA, Ellas testified, so ''we at that time signed an agreement for 3 years and became a member of NECA.'' (Tr. 1:133.) Although Ellas testified that KEC never would have joined NECA except for his understanding that the MRA was part of the CBA (Tr. 1:134), Waters' letter clearly refers to separate documents, Tatum testified that the MRA is a separate document (Tr. 1:52), and it is clear that the agreements themselves are separate documents.

In late June 1988 Ellas signed a Letter of Assent A, the effective date of the document being June 27, 1988. (GCX 3; Tr. 1:25.) Excluding footnotes, the pertinent text reads (GCX 3):

Letter of Assent—A

> In signing this letter of assent, the undersigned firm does hereby authorize Central Mississippi Chapter, Birmingham Division, NECA as its collective bargaining representative for all matters contained in or pertaining to the current and any subsequent approved Inside labor agreement between the Central Mississippi Chapter, Birmingham Division, NECA and Local Union 136, IBEW. The Employer agrees that if a majority of its employees authorizes the Local Union to represent them in collective bargaining, the Employer will recognize the Local Union as the exclusive collective-bargaining agent for all employees performing electrical construction work within the jurisdiction of the Local Union on all present and future jobsites. This authoriza-

> tion, in compliance with the current approved labor agreement, shall become effective on the 27 day of June, 1988. It shall remain in effect until terminated by the undersigned employer giving written notice to the Central Mississippi Chapter, Birmingham Division, NECA and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of the applicable approved labor agreement.

Confirming the opening lines of NECA's Letter of Assent A, Tatum testified that when a contractor signs an Assent A, it authorizes NECA to engage in collective bargaining for it. (1:24). As a new CBA had been made effective April 15, 1988, KEC, by the terms of the Assent A quoted above, became bound to the ''current'' CBA, or CBA1. KEC does not dispute that fact. The dispute in this case centers on the appropriate withdrawal procedure and date.

> By letter dated August 14, 1989 (over a year after executing Assent A), KEC, by Ellas, wrote the Electrical Industry Receiving Trust Fund, to Tatum's attention (RX 7; Tr. 1:43):
>
> This letter is to inform you that Kirkpatrick Electric Company no longer desires to be a member of the National Electrical Contractors Association.
>
> The monthly payroll report enclosed will be the last payment to the National Electrical Industry Fund.

Tatum testified that thereafter (within 30 days by general practice) he notified his national office that effective August 14, 1989 KEC was no longer a member of NECA. (Tr. 1:43–44.) Ellas testified that by the foregoing letter he intended to sever all his relationships with NECA. NECA did not respond to the latter, Ellas testified. From that August 14 forward, Ellas testified, Ellas operated under the belief that KEC was not represented in any way by NECA. (Tr. 1:135.)

Being a member of NECA and a signatory to NECA's Letter of Assent A are different undertakings. Gary C. Reaves, Local 136's business manager, testified that Local 136 is a party to 35 Letters of Assent A, but only 10 to 15 of the contractors are dues-paying members of NECA. Contractors come and go as members of NECA based on benefits they perceive they are receiving by their membership, Reaves testified. But even when they drop their NECA membership, ''that doesn't disturb the [Letter of Assent A] relationship with us.'' (Tr. 1:115.) To cancel its obligation under an Assent A, a signatory contractor must send a cancellation notice 150 days prior to the anniversary date of the CBA with which it is associated. (Tr. 1:115.)

Reaves testified (and as Assent A specifies) that by signing Letter of Assent A a contractor designates NECA as its collective-bargaining representative. Because of that agency status, Reaves deals only with NECA, not directly with a signatory contractor for all matters pertaining to the labor agreement. (Tr. 1:103–104, 112, 114–115.) No one (before this case, presumably) ever told Reaves that KEC had withdrawn from membership in NECA. However, Reaves testified, membership in NECA was an immaterial matter to the Union. (Tr. 1:111.)

Article I of CBA1 has two provisions, relevant here, bearing on its termination date. They read (GCX 4 at 1):

> *Section 1.01*. This agreement shall take effect April 15, 1988, and shall remain in effect through May 31, 1991, unless otherwise specifically provided for herein. It shall continue in effect from year to year thereafter, from June 1, through May 31, of each year, unless changed or terminated in the way later provided herein.
>
> *Section 1.02*. (a) Either party desiring to change or terminate this agreement must notify the other, in writing, at least 90 days prior to the anniversary date.

However, a contractor signatory to Assent A who desires to withdraw from a contractual relationship with the Union must also cancel the bargaining authority the contractor granted NECA under Assent A. As earlier quoted, that authority is canceled by giving written notice as least 150 days before the ''then current anniversary date of the applicable labor agreement.'' (GCX 3; 1:27–28, Tatum.) The ''anniversary'' date, Tatum testified, is the date the initial term, or any 1-year automatically extended term, ends, that being May 31. (Tr. 1:35, 59–60.) Calculating 150 days before the May 31, 1991 expiration date of CBA1 produces the approximate date of January 2, 1991. Under this reading, KEC needed to have canceled by January 2, 1991, the bargaining authority which it gave NECA effective June 27, 1988. I shall return to this topic in a moment.

5. The 1991–1994 CBA

Anticipating the scheduled May 31, 1991 expiration of CBA1, Tatum (Tr. 1:35–36) and Reaves (Tr. 1:101–103) began about the first of March 1991 negotiating a successor agreement to CBA1. In June 1991 they reached agreement and the successor contract, CBA2 (GCX 5), is effective June 1, 1991, through May 31, 1994. (Tr. 1:33, 103.) CBA2 contains the same expiration provisions, quoted above from CBA1, except for the dates. (GCX 5 at 1.) Tatum testified that before CBA1 expired he never received a letter from KEC withdrawing its Letter of Assent A authorization. (Tr. 1:33.) Tatum testified that he entered these renewal negotiations on behalf of everyone signatory to a Letter of Assent A, and, recalling from memory at the hearing, he estimated the number of signatory firms to be about 35. That number represents the firms within the territorial jurisdiction of Local 136. (Tr. 1:46–47.)

Some 5 months after the June 1, 1991 effective date of CBA2 (the negotiated 1991–1994 successor to CBA1), KEC, by Ellas, wrote IBEW Local 136, copy to NECA, the following letter (RX 6) dated November 6, 1991 (Tr. 1:32–34, 43, 48, 59, 136):

> This letter is to serve notice that Kirkpatrick Electric Company, Inc. does not intend to renew the contract that we presently have. Our contract expires mid-night on May 31, 1992.
>
> This notice is within the 150 day notice requirement.

Ellas testified that his intent by the letter was to give the 150-day notice to both the Union and to NECA. (Tr. 1:136.) Ellas believed that CBA1 continued in effect, after May 31, 1991, from year to year until canceled by one of the parties. This November 6, 1991 letter, therefore, was to give ample notice (more than 150 days) before the (presumed) extended expiration date of May 31, 1992, for CBA1. (Tr. 1:136–137,

141.) Ellas testified that after this letter he received no response or other correspondence from either Local 136 or NECA advising him that he was misreading the documents. His first notice to such effect was word from NLRB Region 10 that the charge in this case had been filed. (Tr. 1:137–138, 141.)

Tatum (Tr. 1:61–62, 64), who would not stand on any formality of receiving only a copy (Tr. 1:63), and Reaves (Tr. 1:107, 116) testified that KEC's November 6, 1991 letter was too late to avoid being bound by CBA2, the already negotiated and executed successor contract, and timely by far to cancel the NECA authority and to terminate the connection with Local 136 as of May 31, 1994. (Actually, the letter does not purport to cancel the bargaining authority assigned in the June 1988 Assent A.)

Although Ellas testified that he never received any message that his letter of November 6, 1991, was untimely, Tatum testified that on several occasions after the November 6 letter he informed Ed Royal, KEC's part-time office manager and bookkeeper, of such fact and that KEC probably was bound by the 1991–1994 agreement, CBA2. (Tr. 1:65–66). The complaint does not allege Royal to be KEC's agent. Although Ellas testified that Royal merely fills out reports but has no authorization to represent KEC in any way (Tr. 1:152), Ellas also states that Royal handled all the forms, reports, and benefit payments required under the agreement with the Union. ''I have nothing to do with it,'' Ellas claims. (Tr. 1:151.) Although Ellas signed the checks with Royal prepared, Ellas did not inquire into the percentages or amounts on a monthly basis, relying instead on the annual profit-and-loss statement to determine the overhead figure he needed to incorporate into his job bids. (Tr. 1:151–153.) Notwithstanding Ellas' position that he considered KEC bound to a (presumed) 1-year extension of CBA1, in fact KEC paid the increased benefit payments required under CBA2. (Tr. 1:112.)

Gary Reaves, Local 136's business manager, testified that he was aware KEC was a signatory to Assent A (Tr. 1:103, 106), and that after he received KEC's November 6, 1991 letter he called Tatum, the employer's designated representative, who said he would take care of the matter. (Tr. 1:105.)

6. Randall Mauldin fired

Apprentice Randall W. Mauldin testified that around November to December 1991, at the jobsite, Ellas told him that KEC was going nonunion because expenses were too high. Ellas said he would like for Mauldin to remain with KEC, but that if he could get another referral out of the (union) hall, to take it. Mauldin reported this conversation to Randy Bottomlee, the apprentice coordinator, who told him to keep working at KEC. (Tr. 1:76–78, 80, 82.)

Ellas confirms the November 1991 ''open shop'' conversation with Mauldin and that he expressed the hope that Mauldin would remain with KEC. According to Ellas, Mauldin came in later and said that Bottomlee told him he could remain at KEC as long as KEC paid his wage rate and health insurance. Ellas said KEC would do so. (Tr. 1:138.) Bottomlee testified that when Mauldin reported KEC's plan he expressed surprise, but said the CBA did not expire until 1994 and for Mauldin to stay at KEC. If KEC ceased making the required fringe benefit contributions, Bottomlee added, there was a dispute resolution provision to handle that. Although Bottomlee denies saying that Mauldin could stay as long as he received scale and benefits (Tr. 1:93–94, 98), Mauldin concedes that such is what he was told and he reported that either to Ellas or to Journeyman/Foreman Larry Earnest. (Tr. 1:83.)

Mauldin (Tr. 1:79) and Ellas (Tr. 1:139) agree that their next conversation on the topic was about May 1992. Mauldin testified that about mid-May Ellas asked whether Mauldin would stay if KEC switched the (health) insurance carrier. Mauldin replied that he could not do so because he had only a year left in the apprenticeship program and he did not want to throw away his (time) investment. Mauldin deemed the choice one of throwing away his time investment because, he testified, he thought it meant KEC would be converting at that point to a nonunion shop. (Tr. 1:79–80.) According to Ellas, the second conversation occurred when he gave Mauldin the termination slip. Initially he did not recall the conversation (Tr. 1:139), but later said that he told Mauldin to sign it to show KEC was severing its relationship ''as far as the fringe benefits and all on his behalf as of the 31st of May, '92, just like the letter states.'' Mauldin said nothing. (Tr. 1:153–154.) I credit Mauldin concerning the mid-May conversation.

The termination letter was delivered on Thursday, June 4. Mauldin testified that on such date Ellas came to the jobsite and, tendering him the termination notice (GCX 6) and his paycheck, told him to read and sign the notice, which Mauldin did without comment. (Tr. 1:68–71, 84, 88–89.) To Mauldin, the notice meant that his employment at KEC was terminated. (Tr. 1:87.) According to Ellas, his intent by the letter was to make sure the Union understood that KEC was no longer obligated to pay any fringe benefits or anything and ''that our relationship had been severed with them.'' (Tr. 1:139, 153.) As to Mauldin, Ellas assertedly wanted him to acknowledge his awareness that KEC was severing its relationship with the Union ''as far as the fringe benefits and all on his behalf.'' (Tr. 1:139, 153.) At no time, Ellas testified, did he tell Mauldin that he could not be employed. It was KEC's intent, Ellas testified, that Mauldin remain employed as an apprentice at KEC, with his same rate of pay, but under KEC's health insurance carrier. (Tr. 1:140–141.)

The termination notice is in two parts, both dated May 29, 1992. The first part is addressed as a letter from KEC, by Ellas, to Mauldin. The second part is the ''Acknowledgement'' form, which Mauldin signed and which reads, ''I, Randall W. Mauldin, acknowledge receiving a copy of my termination of employment from Kirkpatrick Electric Company, Inc.'' A copy of the form is shown addressed to IBEW Local 136. The letter portion of the notice reads (GCX 6):

> This letter is to notify you that this company Kirkpatrick Electric Company, Inc., has severed our relationship with IBEW Local #136, as of 31 May 1992.
>
> You are hereby notified by this letter that you are no longer an employee of Kirkpatrick Electric Company, Inc., covered by IBEW Local #136, as of end of work day 29 May 1992.

On June 4, shortly after receiving the termination notice, Mauldin went to the union hall where Bottomlee and Reaves, after inspecting the notice, said he had been terminated and could sign the out-of-work list (OWL) and apply for unem-

ployment compensation. Mauldin signed the OWL that day. They never told Mauldin to quit his job with KEC. (Tr. 1:72–73, 84–86, 94–95, 97, 99–100.)

Either the following day, June 5, or the following Monday, Mauldin received in the mail a ''Separation Notice'' (GCX 7), dated June 4, 1992, and signed by Ellas, informing him, ''Your employment is terminated as of end of work day June 04, 1992 for the following reason: (x) Reduction in Force.'' (Tr. 1:74.) None of the other boxes for voluntarily quit, illness or accident, or discharge is checked. At trial Ellas offered no explanation of why he sent this belated RIF notice to Mauldin.

Evidence is rather skimpy concerning events after June 4, 1992. As I noted earlier, Ellas testified that currently KEC has been doing one-man jobs of 2 to 4 hours a day. (Tr. 1:147.) In the last 18 months (that is, since about late October 1991), Ellas testified, Larry Earnest has done all the work himself. (Tr. 1:147.) As Mauldin was employed during that time as an apprentice to Larry Earnest, it appears that Ellas was referring only to journeyman electricians when saying that Earnest has done all the work. The record therefore is not entirely clear whether KEC in fact has hired no apprentice to replace Mauldin.

B. *Discussion*

KEC's November 6, 1991 letter (RX 6) was ineffective for terminating its contractual obligations with IBEW Local 136. This is so because its August 14, 1989 letter (RX 7) had only dropped its NECA membership. That letter said nothing about terminating the assignment of its bargaining rights to NECA under the June 27, 1988 Letter of Assent A. Hence, when NECA and the Union reached a successor contract, CBA2, effective June 1, 1991, through May 31, 1994, KEC, by virtue of the language in Letter of Assent A, was automatically bound to CBA2 through May 31, 1994. The prior contract, CBA1, was not extended because it was succeeded by CBA2.

So far as the record shows, KEC still has not notified NECA and IBEW Local 136 that it is terminating the assignment of bargaining rights made to NECA in the June 27, 1988 Letter of Assent A. The termination notice (RX 6) respecting the contract, CBA2, does not accomplish that task. Thus, to this day KEC remains bound to the June 27, 1988 Letter of Assent A. *Leapley Co*., 278 NLRB 981 (1986).

KEC affirmatively advances the defense of limitations, Section 10(b) of the Act, on the basis that it repudiated its contractual obligation on November 6, 1991, well beyond the 6-month limitations date of February 7, 1992. The General Counsel does not address this issue in the Government's posthearing brief. In support of its position, Respondent cites and relies on *A & L Underground*, 302 NLRB 467 (1991).

KEC misapplies the limitations defense to this case because the November 1991 letter repudiated nothing. Actually the letter suggests simply that KEC did not intend to renew and was confused about the CBA's expiration date. At all times KEC honored all contractual obligations, paying scale to Mauldin (Tr. 1:81) and even the increased benefits under CBA2. (Tr. 1:112.) Until June 4, 1992, KEC did nothing the Union could have filed a charge over.

By contrast, the employer in *A & L Underground* ''ceased complying with the terms of the agreement'' and expressly notified the Union that it ''hereby cancels, abrogates, terminates, and repudiates any and all Section 8(f) pre hire agreements. . . . The repudiation shall be effective immediately.'' The panel majority in *A & L Underground* ruled that this was a total contract repudiation which triggered the start of limitations. The facts and principles of *A & L Underground* are inapposite here. Accordingly, I find Respondent KEC's limitations defense to be without merit.

Although KEC's November 1991 letter was not a repudiation, its May 29, 1992 letter (GCX 6), delivered June 4, 1992, certainly was. In light of my earlier finding that KEC was bound to the 1991–1994 contract, CBA2, it follows that the May 29, 1992 letter ordinarily would constitute a repudiation, effective the first minute of June 1, 1992, of its obligation to recognize the Union and its obligation to honor CBA2 in violation of Section 8(a)(5) and (1) of the Act, and a discharge that June 4 of Randall W. Mauldin in violation of Section 8(a)(3) and (1) of the Act.

Aside from its effort to escape the Union based on its one-man unit affirmative defense, KEC's primary position, of attempting to show timely cancellation of its assignment of bargaining authority to NECA and a timely termination of its CBA with the Union, rests on a flawed assumption. KEC apparently misapprehends its bargaining relationship with the Union. KEC's obligation to recognize and bargain with the Union flows not from a contract permitted under Section 8(f) of the statute, but from Section 9(a) of the Act based on IBEW Local 136's April 27, 1987 election victory and its August 12, 1987 certification by the Regional Director of Region 10. Thus, even if KEC had timely canceled the assignment of its bargaining rights to NECA, and even if it had timely terminated its obligation under the 1988–1991 CBA, KEC still (ordinarily) would have been obliged to recognize and bargain with the employees' Section 9(a) bargaining representative.

It is true that the Board presumes, until shown otherwise, that a collective-bargaining relationship in the construction industry is 8(f) rather than 9(a). *Comtel Systems Technology*, 305 NLRB 287, 289 (1991); *John Deklewa & Sons*, 282 NLRB 1375, 1385 fns. 41, 42 (1987). But there is no dispute here that the Union won an election and thereafter was certified, thereby establishing its status as the exclusive bargaining representative under Section 9(a) of the Act.

During the term of a CBA the Union is irrebuttably presumed to be the majority representative. At the expiration of the CBA, the presumption of majority status becomes rebuttable. *AMBAC International*, 299 NLRB 505, 506 (1990). After a CBA expires, an employer's obligation to comply with and give effect to the terms and conditions of employment embodied in the expired CBA continues until the employer has fulfilled or been relieved of its duty to bargain about changing such terms and conditions. *Beitler-McKee Optical Co*., 287 NLRB 1311 (1988). None of the exceptions apply here, such as bargaining to impasse after the CBA's expiration, or of withdrawing recognition based on a good-faith doubt of majority status. See generally, Hardin, 1 *The Developing Labor Law* 571–583, 712–714 (3d ed. 1992, ABA, BNA).

Respecting KEC's one-man unit affirmative defense, it argues that Larry Earnest should not be counted in the unit because he is so closely related to owners of a majority (67 percent) of KEC's stock. Even if Mauldin is counted after June 4, the only other person doing bargaining unit work has

been Larry Earnest. Thus, if Earnest is not counted because of his family status, the unit is reduced to one man, Mauldin, for which there would be no duty to bargain under the Board's policy. See *Teamsters Local 115 (Vila-Barr Co.)*, 157 NLRB 588 (1966), and cases collected at *An Outline of Law and Procedure in Representation Cases* 171–172 second 12–231 (Dec. 1992, NLRB). The rule applies when the unit consists of no more than a single permanent employee at all material times. *Haas Garage Door Co*., 308 NLRB 1186 (1992). Should Larry Earnest be counted or excluded?

Citing such cases as *Cerni Motor Sales*, 201 NLRB 918 (1973), KEC argues that, as the child and spouse of those owning 67 percent of KEC's stock, Earnest should not be counted. (See other cases collected in *An Outline of Law and Procedure in Representation Cases*, 294–295 sec. 19–300 (Dec. 1992, NLRB).) Section 2(3) of the Act excludes from coverage ''any individual employed by his parent or spouse.'' *Ideal Elevator Corp*., 295 NLRB 347 fn. 2 (1989). When the employer is a corporation, the Board has applied the Section 2(3) exclusion to children or spouses of a shareholder having a 50-percent or more ownership interest in a closely held corporation. *F & R Meat Co*., 296 NLRB 759, 769–770 (1989).

Countering, the General Counsel cites *Union Plaza Hotel & Casino*, 296 NLRB 918 (1989), where the Board rejected an employer's contention that the contract should be deemed void because the unit contains supervisors. The Government apparently argues that when parties voluntarily enter into a CBA covering a unit which the employer knows includes the son of a majority owner then Earnest should be counted here and the CBA applied.

However, the Board in *Union Plaza* did not count the supervisors in the unit, but merely held that the contract's terms should be applied to them as well. But the key to finding a bargaining obligation is whether more than one statutory employee remains in the appropriate unit. *Searls Refrigeration Co*., 297 NLRB 133, 135 fn. 2 (1989).

Although there is evidence that KEC has bid on at least one job in August 1992 using language suggesting that two employees would be used, it is not clear whether just one actually would be used, rather than two, at twice as many hours. Neither is it clear whether the two means two journeymen or one journeyman and one apprentice.

In any event, it appears that in fact KEC may not have replaced Mauldin, much less hired a second journeyman. I find that the bargaining unit consists only of two individuals (Larry Earnest and Randall Mauldin) on a permanent basis, and that one of these, Larry Earnest, is not a statutory employee because his mother and wife own 67 percent of KEC's stock. Because the appropriate unit with Mauldin consists of a single employee, I find that KEC had no duty to bargain with the Union on June 4, 1992, when it, effective June 1, 1991, withdrew recognition from the Union. Should the unit expand to two or more permanent statutory employees during the term of the 1991–1994 CBA, then KEC's bargaining duty would resume.

I turn now to Mauldin's termination. KEC's position(s) on its termination of Randall Mauldin are a bit bizarre. Mauldin's interpretation of the May 29 letter (GCX 6) which Ellas handed him on June 4, along with his paycheck, is a reasonable one—he was fired. If Ellas actually intended to have Mauldin acknowledge that he no longer would be covered by union fringe benefits, or a CBA with the Union, while working at KEC, then the notice is poorly worded and whatever Ellas said did not help to clarity the situation. It is clear that he did not tell Mauldin that he remained an employee of KEC.

''In determining whether an employee has been discharged, events must be viewed from the employee's perspective; the test is whether the actions of an employer would reasonably lead an employee to believe that he has been discharged.'' *Kinder-Care Learning Centers*, 299 NLRB 1171, 1175 (1990). Under this test, I find that Mauldin reasonably believed that he had been fired.

As I have noted, KEC did not address (either at trial or on brief) the belated RIF notice dated June 4. I find that notice to have been an afterthought, and I need not speculate on its purpose. Finding, as I do, that a moving reason for KEC's discharge of Mauldin was Mauldin's mid-May response that he would not stay if KEC, in effect, went nonunion, I find that the General Counsel established prima facie that Mauldin's discharge violated Section 8(a)(3) and (1) of the Act.

To the extent that is is relevant to analyze motive when it is clear that the discharge is over union status, rather than some alleged conduct of the employee, it became KEC's burden under *Wright Line*, 251 NLRB 1083 (1980), to rebut the Government's prima facie case. This burden is one of persuasion as on an affirmative defense. KEC must show that it would have taken the same action even absent union considerations. This KEC did not do. For example, KEC made no effort to show that Mauldin actually was laid off on June 4 because of a lack of work. The limited references to KEC's business circumstances after June 4, 1992, do not focus on the category of apprentice. While such matters will be relevant to determine backpay (and even to determine whether, for reinstatement purposes, KEC actually would have reduced its work force on or after June 4, 1992 by eliminating the apprentice position), but KEC failed to prove such matters as part of its affirmative burden to rebut the General Counsel's case on the merits. Accordingly, I shall order KEC to reinstate Randall W. Mauldin and to make him whole, with interest.

KEC could argue that there was no violation as to Mauldin because on June 4, 1992, KEC had no duty to apply CBA2 to a one-man unit. Had KEC merely informed Mauldin on June 4 that it no longer would apply the CBA for that reason (a true statement of its no-duty situation), and that Mauldin was welcome to remain at KEC, a voluntary departure by Mauldin would have been neither a discharge nor a constructive discharge. Ordinarily, a Hobson's-choice offer to remain, but without the benefits of an existing CBA, is an unlawful constructive discharge. *Control Services*, 303 NLRB 481, 485 (1991); *Reliable Electric Co*., 286 NLRB 834, 836 (1987). But the ordinary rule would not have been applicable here, however, where KEC had no duty to apply the existing CBA. Unfortunately for KEC, Ellas did more that merely inform Mauldin and assure him that he was welcome to remain at KEC. As I have found, Ellas fired Mauldin. Although KEC had no duty to apply the 1991–1994 CBA because the bargaining unit consisted of but a single statutory employee (Mauldin), KEC was not at liberty to terminate that statutory employee because he wanted the CBA's benefits applied.

CONCLUSIONS OF LAW

1. At nearly all times since the Union's election victory on April 27, 1987, in Case 10–RC–13486, followed by the certification of August 12, 1987, IBEW Local 136 has been the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of the employees in the following appropriate unit:

> All construction and maintenance employees employed by the Employer at its Birmingham, Alabama, facility, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. By withdrawing, effective June 1, 1992, recognition from IBEW Local 136 and repudiating the 1991–1994 collective-bargaining agreement (CBA), Respondent KEC did not violate Section 8(a)(5) and (1) of the Act, because the unit at that time consisted of only one statutory employee, Randall W. Mauldin.

3. By discharging Randall W. Mauldin on June 4, 1992, because of union-related considerations, Respondent KEC has violated Section 8(a)(3) and (1) of the Act.

4. The unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Randall W. Mauldin, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Determination whether the apprentice position was permanently eliminated on June 4, 1992, may be determined at the compliance stage in relation to reinstatement and backpay.

KEC had no duty to recognize and to bargain with the Union on and after June 1, 1992, because the unit consisted only of Mauldin (unlawfully terminated June 4). Larry Earnest was not a statutory employee. Thus, the CBA and its trust fund provisions may not be applied. Accordingly, the backpay obligation shall not include reimbursement of the CBA's trust funds, or reimbursement of other employees, otherwise ordered under *Ogle Protection Service*, 183 NLRB 682 (1970), and *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). Similarly, I shall not order KEC to reimburse its employees, under *Carthage Sheet Metal Co*., 286 NLRB 1249, 1252 fn. 11 (1987), for any expenses ensuing from KEC's failure to make contributions to the various funds established by the 1991–1994 agreement, CBA2.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Kirkpatrick Electric Co., Inc. (KEC), Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting IBEW Local 136 or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Randall W. Mauldin immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Birmingham, Alabama office and at its Birmingham jobsites copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting IBEW Local 136 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Randall W. Mauldin immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Randall W. Mauldin that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

KIRKPATRICK ELECTRIC CO., INC.